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In The Supreme Court of the United States

HENRY TORROMEO and MDR CORPORATION,
Petitioners,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* THE HONORABLE STEVE CHABOT, CHAIR, SUBCOMMITTEE ON THE CONSTITUTION, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES

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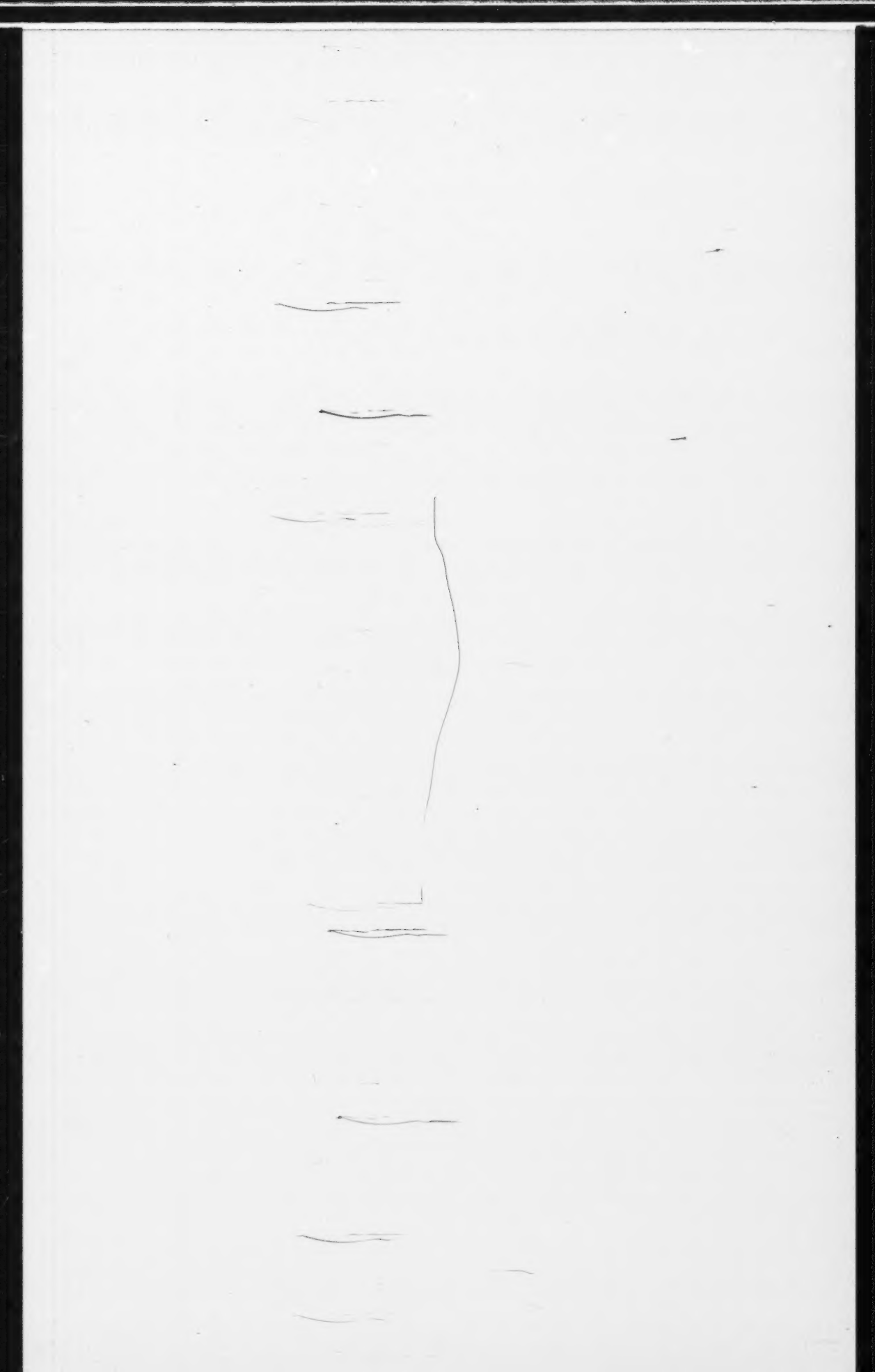

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INTEREST OF THE *AMICUS CURIAE*

The Honorable Steve Chabot, Chair of the Subcommittee on the Constitution of the Judiciary Committee of the U.S. House of Representatives, has received the consent of the parties to file this brief as *amicus curiae* through letters of consent filed with the Clerk of the Court.[1]

The oversight jurisdiction of the House Subcommittee on the Constitution includes the constitutional protection of private property rights. This *amicus curiae* brief provides assistance to the Court by detailing the results of legislative investigations and proposals in the Congress to address the problems caused by the current application of the so-called "State-Litigation Rule" set forth in this Court's 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

The Subcommittee has repeatedly determined over the last decade, and reaffirmed again this year, that the right of property owners to have Fifth Amendment takings claims adjudicated on the merits in the federal courts is being severely restricted, if not extinguished, by the current application of the State-Litigation Rule. It is with an appreciation of the gravity of this appeal that Chairman Chabot submits this brief respectfully to urge that the Court reverse the decision of the First Circuit in a manner that will restore the right of property owners to have Fifth

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[1] Pursuant to Rule 37.6 of the Court, counsel for the *amicus curiae* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no person or entities other than the *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Amendment takings claims adjudicated on the merits in the federal courts.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* to review the State-Litigation Rule adopted in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), but recently questioned in the concurring opinion of four justices in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005).

Between 1997 and 2000, the Subcommittee on the Constitution of the Judiciary Committee of the U.S. House of Representatives inquired into the impact of this Court's 1985 requirement formulated in *Williamson County* that property owners must pursue takings claims in State court before their Fifth Amendment takings claims may be adjudicated by a federal court. The Subcommittee determined that *Williamson County* has almost universally denied property owners the ability to have a federal court determine the merits of a Fifth Amendment takings claim. As a result, in 1997 and again in 2000 the Subcommittee and the House of Representatives passed bills to "simplify and expedite access to the Federal courts," but without altering substantive Fifth Amendment takings claim standards.

In 2006, with the adverse effects of *Williamson County* still being felt, the Subcommittee took up the issue again and a new bill, H.R. 4772, the Private Property Rights Implementation Act of 2006, which would operate to similar effect, was approved by the House Judiciary Committee by voice vote. It is currently awaiting action by the full House.

Consistent with these bills, the *amicus curiae* respectfully submits that this Court should resolve the current conflict among the federal courts regarding access to the federal courts in a manner that eliminates or at least mitigates the obstacles that have resulted from *Williamson County* and provides guidance to Congress regarding the Supreme Court's understanding of the current scope of property rights protection.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICTING INTERPRETATIONS OF *WILLIAMSON COUNTY'S* STATE-LITIGATION RULE IN A MANNER THAT RESTORES THE RIGHT OF PROPERTY OWNERS TO PURSUE TAKINGS CLAIMS IN FEDERAL COURT, AND PROVIDES CONGRESS WITH GREATER GUIDANCE REGARDING CONSTITUTIONAL PROTECTIONS OF PROPERTY RIGHTS.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court wrote: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner *cannot* claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." 473 U.S. at 195 (emphasis added). This Court did not say that the federal takings claim co-existed from the outset with the state claim, or that the plaintiffs in *Williamson County* were simply in the wrong forum. Rather, the Court held that a property owner *cannot* bring a federal takings claim until that claim has been litigated in state court and just compensation has been denied. In 1999, this Court

reaffirmed this interpretation, holding in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999), that a Fifth Amendment takings claim "does not accrue" until state law and procedures have been utilized. Thus, the guarantees of the Fifth Amendment[2] are treated differently in Federal courts than other Federal constitutional claims brought pursuant to 42 U.S.C. § 1983. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 183 (1961) (exhaustion of State judicial remedies not necessary).

Williamson County has caused a crisis in procedural takings law, because federal judges have interpreted it so as to avoid addressing the merits of federal takings claims. Federal courts often dismiss property owners' takings claims because the property owners have not first litigated their claims in State court. When the property owners return to court after litigating the State law claims in State court, the same Federal courts hold that Federal takings claims are barred because they could have been litigated in the State court proceedings. This is the so-called "*Williamson County* Trap."

From 1997 to 2000, the Subcommittee on the Constitution of the House Judiciary Committee conducted an inquiry into the impact of *Williamson County* on the rights of property owners under the Fifth Amendment's Takings Clause. The Subcommittee was provided with credible research showing that in 94 percent of all takings cases litigated between 1983 and 1988,[3] and in 83 percent

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[2] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("Fifth Amendment . . . should not be relegated to the status of a poor relation.")

[3] *See* H.R. Rep. No. 106-518, 106th Cong., 2d Sess. at 10 (2000), *citing* G. Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far*

of the takings claims initially raised in the federal district courts from 1990 to 1998, the federal court never reached the merits of the property owner's claim of a taking without just compensation.[4] Of those property owners who could afford to appeal their cases through the state courts and then proceed in federal court, 64 percent still failed to have their claims resolved on the merits. Moreover, in that small portion of appellate cases where a federal court found a takings claim to be procedurally ripe *and* addressed the merits, it took property owners "on the average, 9.6 years to have an appellate court reach its determination."[5] And these statistics do not address the low income or middle class property owners who, in the face of the expensive procedural challenges that stand between them and a federal forum on the merits of their federal civil rights claims, are too intimidated to even start down the long road to a hearing on the merits in federal court.

The Subcommittee also became aware of the inconsistency between *Williamson County* and *City of Chicago v. International College of Surgeons,* 522 U.S. 156 (1997). In *City of Chicago*, this Court held that when constitutionally aggrieved landowners properly file their takings actions in state courts, municipal defendants may remove the cases to federal court. That decision relied on 28 U.S.C. § 1441(a), which permits removal of state court actions to federal courts only where the plaintiff could have initially filed the action in federal court. *Williamson*

Federal Courts Will Go To Avoid Adjudicating Land Use Decisions, 10 J. Land Use & Envtl. L. 91, 92 n.3 (1994).

[4] *See ibid., citing* J. Delaney and D. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse,* 31 Urb. Law. at 202-231 (1999), at 196.

[5] *Ibid.*

County and *City of Chicago* thus appear to be irreconcilable: if a municipality may remove a federal taking claim to federal court, then takings plaintiffs *must be allowed* to bring their claims in federal court from the start.

The Judiciary Committee's report that emerged from this investigation focused precisely on the consequences of *Williamson County* that underlie the instant appeal. The Report discussed the lengthy and expensive litigation required to pursue a takings claim through the state and then federal courts: for example, 14 years in *Del Monte Dunes*, and 13 years in *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994).[6]

> The expense of bringing a Federal Takings claim through the labyrinthine procedures in place today is disproportionately borne by private citizens, who unlike local governments, cannot draw on the public treasury to defend their rights. Hence, the current system tends to deter individuals from protecting their rights, uniquely guaranteed by the Bill of Rights, far more than it deters local governments from defending their actions.[7]

The Committee also took note of the application of claim and issue preclusion defenses to bar federal takings claims, as well as the use of various abstention doctrines, to close the doors of the Federal courthouse and put takings plaintiffs in a perpetual holding pattern.[8] The Report concluded: "The effect of the reasoning of these cases is that many property owners end up with *no opportunity* to

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[6] H.R. Rep. No. 106-518, 106th Cong., 2d Sess. (2000) at 5-8.

[7] *Ibid.* at 15.

[8] *Ibid.* at 8-9.

have their Federal constitutional claims heard in Federal court."[9]

To address these practical barriers to protecting Americans' property rights, legislation was first introduced in the 105th Congress. The Private Property Rights Implementation Act of 1997 (H.R. 1534, 105th Cong., 1st Sess. (1997)) was reported out by the House Judiciary Committee on October 21, 1997 and passed the full House on October 22, 1997 by a vote of 248-178. However, the Senate did not vote on the bill's merits before the end of the term.

During the 106th Congress, Representative Chabot's predecessor as Chair of the House Subcommittee on the Constitution, the Hon. Charles Canady, was the lead sponsor of the Private Property Rights Implementation Act of 2000. H.R. 2372, 106th Cong., 2d. Sess. (2000). Among other things, H.R. 2372 was designed to address the suppression of individuals' defenses to property rights violations by clarifying and simplifying the procedures governing federal property rights claims in federal court.

Most significant to this case, H.R. 2372 would have removed the requirement that property owners litigate their federal takings claims in state court first, in order to ensure that property owners like the Petitioners in this case have a meaningful opportunity to have the federal courts decide their federal takings claims. On March 16, 2000, H.R. 2372 passed the House of Representatives by a vote of 226-182, with Rep. Chabot's support.

Although H.R. 2372 was not approved by the entire Congress, the problems created by *Williamson County* have not abated since 2000. In *Santini v. Connecticut Hazardous*

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[9] *Ibid.* at 9 (emphasis in original).

Waste Management Service, 342 F.3d 118 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004), for example, the Second Circuit in 2003 addressed the merits of the plaintiffs' federal takings claim following litigation in the state system, which arose from events that occurred from 1991 to 1993. Even then, the Second Circuit, in allowing Santini to proceed and allowing Second Circuit litigants to reserve their federal claim during state court proceedings, effectively affirmed that Santini had been *properly required* to proceed through six years of state court litigation before his federal claim accrued and could even be pursued in federal court. And while this Court's decision in *San Remo* went on to overrule the claim reservation doctrine created by *Santini*, 125 S.Ct. at 2504, the salient point is that *San Remo* ended 12 years of litigation, without a federal court having ruled on the petitioners' Fifth Amendment takings claim.

Thus, these two cases highlight the two consequences of the *Williamson County* state court requirement that operated together to deny property owners their rights under the Takings Clause of the Fifth Amendment: the length of time in state court necessary to ripen the federal claim, and the property owner's inability to access the federal courts once the state court litigation has terminated.

In that context, and in light of the groundswell of popular reaction to this Court's decision in *Kelo v. City of New London*, 545 U.S. ___, 162 L.Ed.2d 439, 125 S.Ct. 2655 (2005), Chairman Chabot introduced in the 109th Congress a similar bill with bipartisan support in the House – the Private Property Rights Implementation Act of 2006. H.R. 4772, 109th Cong., 2d Sess. (2006). Like H.R. 2372, it would simplify and expedite access to the Federal courts for injured parties whose property rights under the United State Constitution have been deprived. Specifically,

Section 2 of H.R. 4772 would address the *Williamson County* dilemma directly by amending 28 U.S.C. § 1343 to add:

> In an action in which the operative facts concern the uses of real property, the district court shall exercise jurisdiction [over Section 1983 claims] even if the party seeking redress does not pursue judicial remedies provided by a State or territory of the United States.

H.R. 4772, 109th Cong., 2d Sess. (2006). The intent of this provision is to *overrule* any requirement from *Williamson County*, and the predominant interpretation adopted by the various circuit courts of appeals, that property rights plaintiffs must initially bring Fifth and Fourteenth Amendment claims in state court if they ever want to try and subsequently access federal court. In other words, under H.R. 4772, claimants under 42 U.S.C. § 1983 would have *immediate* access to federal courts to vindicate their takings, due process and equal protection claims in the land-use approval context.

In addition, Section 2 of H.R. 4772 would address concerns about federal abstention by further amending 28 U.S.C. § 1343 to add:

> Whenever a district court exercises jurisdiction [in a Section 1983 case] in which the operative facts concern the uses of real property, it shall not abstain from exercising or relinquish its jurisdiction to a State court if the party seeking redress does not allege a violation of a State law, right, or privilege, and no parallel proceeding is pending in state court that arises out of the same operative facts as the district court proceeding.

Id. H.R. 4772 was introduced with 36 co-sponsors on February 16, 2006. Following hearings, the Subcommittee on the Constitution discharged the bill to the full Committee on July 7, 2006. On July 12, 2006, H.R. 4772 was approved by the House Judiciary Committee by voice vote and sent to the House floor, where action is pending.

The procedural confusion engendered by *Williamson County* was informed by but not resolved in this Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005). Nevertheless, the concurring opinion of the late Chief Justice Rehnquist noted the "dramatic impact" of the State-Litigation Rule on takings plaintiffs, acknowledged that the justifications for the rule are "suspect," and suggested that this part of *Williamson County* may have been wrong. 545 U.S. at 340, 342. The Chief Justice called for the Court to reconsider the State-Litigation Rule in an "appropriate case."

This is such a case. The Supreme Court can resolve the ongoing procedural confusion by granting *certiorari* here and eliminating *Williamson County*'s prudential procedural requirements. Failure to do so may force Congress to exercise its well-established authority to regulate Federal court procedures. *See, e.g., Sibbach v. Wilson*, 312 U.S. 1, 10 (1941). Resolution now of the conflicting interpretations of *Williamson County* will aid Congress, the Subcommittee on the Constitution, and the Judiciary Committee in understanding their opportunities and obligation to protect the constitutional rights of property owners.

CONCLUSION

This Court should resolve the conflicting interpretations of the *Williamson County* state court

requirement in a manner that will restore the rights of property owners to have a federal court adjudicate their Fifth Amendment taking claims and will provide guidance to Congress regarding the Supreme Court's understanding of the scope of constitutional protection of property rights.

August 23, 2006

Respectfully submitted,

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